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# The Right to Take Part to Cultural Life: General Comment No. 21 of the United Nations Committee on Economic, Social and Cultural Rights

*El derecho a participar en la vida cultural: Observación general n.º 21 del Comité de las Naciones Unidas sobre Derechos Económicos, Sociales y Culturales*

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**Abstract:** The United Nations Committee on Economic, Social and Cultural Rights has adopted a General Comment on «the right to participate in cultural life». This is an important contribution to the understanding of cultural rights, in the context of human rights, and to their implementation by States Parties to the International Covenant on Economic, Social and Cultural Rights. For too long, cultural rights have received little attention by international human rights monitoring bodies. It is important to look at cultural human rights because States' policies are showing some difficulties in managing a proper application of cultural rights in wider multicultural societies. This article looks at the main issues raised in this recent General Comment adopted in December 2009.

**Key words:** United Nations, Committee on Economic, Social and Cultural Rights, human rights, cultural rights.

**Resumen:** El Comité de derechos económicos, sociales y culturales de las Naciones Unidas ha adoptado un Comentario general sobre el «derecho a participar en la vida cultural». Se trata de una importante contribución para entender los derechos culturales, en el contexto de los derechos humanos, y para su aplicación por parte de los Estados Partes del Pacto Internacional sobre derechos económicos, sociales y culturales. Por mucho tiempo, los derechos culturales han recibido una escasa atención por parte de los mecanismos internacionales de control de los derechos humanos. Es importante considerar los derechos culturales en cuanto las políticas estatales muestran algunas dificultades para su aplicación en las sociedades multiculturales. Este artículo considera los elementos principales que se tratan en el reciente Comentario general adoptado en diciembre de 2009.

**Palabras claves:** Naciones Unidas, Comité de derechos económicos, sociales y culturales, derechos humanos, derechos culturales.

**Sumario:** 1. INTRODUCTION. 2. CULTURAL RIGHTS, IDENTITY RIGHTS AND COLLECTIVE RIGHTS. NORMATIVE ELEMENTS. 3.1. Elements of the Right to Take Part in Cultural Life. 3.2. Possible Limitations to the Right. 3.3. Non-discrimination and Equal Treatment. 3.4. Persons and Groups Requiring Special Protection. 4. STATES PARTIES' OBLIGATIONS AND IMPLEMENTATION. 5. VIOLATIONS. 6. CONCLUSIONS

## 1. INTRODUCTION

The right to take part in cultural life is strictly related to the wider concept of cultural rights.<sup>1</sup> When compared to other areas of international human rights, such as civil, political, economic and social rights, cultural rights have not usually received a sufficient amount of consideration which would clarify their content in the context of human rights law.<sup>2</sup> Only in 2009, the United Nations (UN) Committee on Economic, Social and Cultural Rights (hereinafter «CESCR», or the «Committee») adopted the General Comment No. 21<sup>3</sup> which tries to address complex issues that are very much connected to the definition and enjoyment of culture as a fundamental component of human rights.

The definition of cultural rights has become particularly relevant in the contemporary debate on human rights protection.<sup>4</sup> Traditionally, the protection of cultural rights has been often confined to the right to education, access to artistic events, and protection of the rights of authors in the form of individual rights. However, culture and related rights, as forms of collective rights have been strictly related to minorities'<sup>5</sup> and indigenous peoples' rights<sup>6</sup> with a particular attention to certain cultural elements that charac-

<sup>1</sup> On this issue see generally Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond*, Leiden/Boston, Martinus Nijhoff, 2007.

<sup>2</sup> See Jack Donnelly, *Universal Human Rights in Theory and Practice*, 2<sup>nd</sup> ed., Ithaca, NY: Cornell University Press, 2003, p. 218. Among the first attempts to define these rights and States' obligations see: *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/CN.4/1987/17, Annex; and *Human Rights Quarterly*, vol. 9, 1987, pp. 122–135; International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, <http://www.unhcr.org/refworld/docid/48abd5730.html> [accessed 31 August 2011].

<sup>3</sup> CESCR, General Comment No. 21, *Right of Everyone to Take Part in Cultural Life*, UN Doc. E/C.12/GC/21, 21 December 2009.

<sup>4</sup> See Jack Donnelly, «Cultural Relativism and Universal Human Rights», *Human Rights Quarterly*, vol. 6, no. 4, 1984, pp. 400–419.

<sup>5</sup> See generally Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective*, Martinus Nijhoff, 2009; Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford University Press, 1993.

<sup>6</sup> See *United Nations Declaration on the Rights of Indigenous Peoples*, UN Doc. A/Res/61/295 (13 September 2007). See also Alexandra Xanthaki, *Indigenous Rights and United Nations Standards*, Cambridge, Cambridge University Press, 2007, Chapter 3; Marco Odello, «United Nations Declaration on Indigenous Peoples», *Australian Law Journal*, vol. 82, 2008, pp. 306–311; Marco

terise minorities and other groups within the State.<sup>7</sup> Due to the increasing phenomenon of migration, States with new immigrant communities are facing some specific problems concerning the level and degree of recognition of traditional cultures which are typical of some immigrants. In this last context, it is important to notice that all types of migrants bring with them a set of cultural traditions, including language and religion among the most common ones. These are often considered to be part of the cultural identity of the individuals and groups that determine their specific characteristics as a group. Some of the traditions also include customary rules related to family structures, religious belief, inter-personal relations or food habits, which sometimes conflict with the standards and rules of the host State. Modern multicultural societies face the problem of accommodating and integrating different cultural traditions within a well established social, economic and legal system that is shaped not only on specific national constitutional values, but also on the international standards for the respect of fundamental rights.<sup>8</sup>

This article shall focus on the suggestions made by the CESCR in the General Comment No. 21, in some relevant other General Comments by human rights treaty bodies, and it shall consider some of the Concluding Observations that have been provided in its practice, with a particular attention to the protection and promotion of cultural expressions within States Parties to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).<sup>9</sup> The debate on recognition and promotion of cultural rights is much wider than the limited aspect of the participation in cultural life of the community. It includes national and international standards, legislation and case-law which cannot be discussed here in full details, due to the limits and focus of this article.

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Odello, «Indigenous Rights in the Constitutional State», in M. Odello and S. Cavandoli (eds), *Emerging Human Rights in the XXI Century*, Abingdon, Routledge, 2011.

<sup>7</sup> See generally Will Kymlicka (ed.), *The Rights of Minority Cultures*, Oxford, Oxford University Press, 1995.

<sup>8</sup> See Anthony Anghie, «Human Rights and Cultural Identity: New Hope for Ethnic Peace», *Harvard International Law Journal*, vol. 33, 1992, p. 341 ff.

<sup>9</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b36c0.html> [accessed 31 August 2011].

## 2. CULTURAL RIGHTS, IDENTITY RIGHTS AND COLLECTIVE RIGHTS

Several international human rights treaties include references to the right to culture.<sup>10</sup> However, the legal dimension of culture in the field of human rights has not been always defined in very clear terms. Only rather recently, with the 2001 UNESCO *Declaration on Cultural Diversity*<sup>11</sup> and the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,<sup>12</sup> the legal content and possible dimension of cultural rights have been better spelled out.<sup>13</sup> Further clarifications regarding cultural rights can be found in other relevant international instruments, such as the International Labour Organisation (ILO) *Convention No. 169 concerning Indigenous and Tribal Peoples*,<sup>14</sup> the UN *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*,<sup>15</sup> the *Framework Convention for the Protection of National Minorities*,<sup>16</sup> and the 2007 UN *Declaration on the Rights of Indigenous Peoples*<sup>17</sup> (UNDRIP).<sup>18</sup> The UN *Convention on the Rights of the Child* (CRC)

<sup>10</sup> UN, *Universal Declaration of Human Rights*, G.A. res. 217A (III), UN Doc A/810 at 71 (1948), Art. 27(1); *United Nations Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, *United Nations, Treaty Series*, vol. 1249, p. 13, Art. 13(c); *Convention on the Rights of the Child*, 20 November 1989, *United Nations, Treaty Series*, vol. 1577, p. 3, Art. 31(2); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, Art. 43(1)(g); *Convention on the Rights of Persons with Disabilities*, Art. 30(1).

<sup>11</sup> Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its thirty-first session on 2 November 2001.

<sup>12</sup> UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, CLT-2005/CONVENTION DIVERSITE-CULT REV (20 October 2005).

<sup>13</sup> See UNESCO, *L'UNESCO et la question de la diversité culturelle: bilan et stratégies, 1946-2004*, Paris, Division des politiques culturelles et du dialogue interculturel, 2000 (Version révisée septembre 2004).

<sup>14</sup> Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. See Patrick Thornberry, *Indigenous Peoples and Human Rights*, Manchester, Juris Publishing and Manchester University Press, 2002, chapter 14.

<sup>15</sup> Adopted by UN General Assembly resolution 47/135 of 18 December 1992.

<sup>16</sup> Council of Europe, *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157, available at: <http://www.unhcr.org/refworld/docid/3ae6b36210.html> [accessed 31 August 2011].

<sup>17</sup> UN Doc. A/Res/61/295. See also, Marco Odello, 'United Nations Declaration on Indigenous Peoples' (2008) 82 *Australian Law Journal*, pp. 306-311.

<sup>18</sup> Other related documents include: Document of the Copenhagen meeting of the conference on the human dimension of the CSCE, Copenhagen, 29 June 1990; *European Charter for Regional or Minority Languages*, Strasbourg, 5 November 1992, ETS 148; *International Conven-*

also provides a wide concept of cultural rights in particular related to education. The CRC recommends, in Article 29, that the education of a child is geared towards developing a respect for his or her cultural identity, language and values, for the cultural values of the country in which the child is living, the country from which he or she may originate and for civilizations different from his or her own.

The clarification of the legal protection of cultural rights has become a very relevant issue in contemporary legal and political debate, in particular due to the phenomenon of new forms of migration, the promotion for the respect of minorities and indigenous peoples, and for the possible implications for the universality of human rights in relation to cultural relativism and respect of cultural specificities,<sup>19</sup> which may infringe, restrict or affect in negative ways fundamental individual rights.<sup>20</sup>

States have adopted different measures to face the complex relationship between existing constitutional rights, often framed in conformity with international legal standards, and the respect of a variety of cultural expressions. Clear examples in the European context such as the French legislation on the use of religious symbols in public places,<sup>21</sup> the case-law of the United Kingdom,<sup>22</sup> and the decisions by the European Court on Human Rights<sup>23</sup> provide an idea of dissimilar approaches concerning national responses.<sup>24</sup> These responses are also framed on the basis of exiting specific situations in each country, including issues of national security and public order, with particular

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*tion on the Elimination of All Forms of Racial Discrimination*, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965; *Convention on the Prevention and Punishment of the Crime of Genocide*, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948;

<sup>19</sup> See Kymlicka, *The Rights of Minority Cultures*, *supra* note 7.

<sup>20</sup> See Donnelly, *Universal Human Rights*, *supra* note 2, pp. 90-92.

<sup>21</sup> Loi no. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, *Journal Officiel de la République Française*, 17 mars 2004, p. 5190.

<sup>22</sup> *Ghai v. Newcastle City Council* [2010] EWCA Civ 59; and *Eweida v. British Airways* [2010] EWCA Civ 80.

<sup>23</sup> *Aktas v. France* (Application no. 43563/08), *Bayrak v. France* (no. 14308/08), *Gamaleddyn v. France* (no. 18527/08), *Gbazal v. France* (no.29134/08), *J. Singh v. France* (no. 25463/08) and *R. Singh v. France* (no. 27561/08).

<sup>24</sup> See Dominic McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, Oxford, Hart, 2006.

reference to anti-terrorist measures, which may limit the enjoyment of certain human rights.

This complex situation is also very much related to the generally accepted concept of human rights and the relevance of cultural rights in human rights law. The idea of universal rights and the exclusion of all differences to avoid forms of discrimination seem sometimes at odds with the idea of strengthening the difference among certain people and certain groups within the State. This approach has been traditionally used to affirm both a formal and substantial equality among individuals. The practice of liberal States has been based on the assumption, also affirmed in Article 1 of the UN *Universal Declaration on Human Rights* which states that «All human beings are born free and equal in dignity and rights» and in Article 2 that «Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status».

These provisions have been sometimes interpreted in the sense that distinctions should be avoided, pursuing a formal and substantial equality among individuals. At the same time, governments and International Organisations have sometimes forgot or underestimated existing differences which might be based on a variety of cultural traditions. These traditions are often considered an essential part of the cultural characteristics of certain groups and are seldom related to the concept of cultural identity.<sup>25</sup> The effect has been the trend to eliminate or limit the conditions for possible forms of distinctions based on race, language, religion, and therefore all those cultural characteristics which may contribute to define certain groups, including minorities and indigenous peoples, but also certain forms of discrimination based on sex and gender, such as family practices regulating marriage and the female genital mutilation, with particular attention to specific women's rights.<sup>26</sup> However, this approach

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<sup>25</sup> Yvonne M. Donders, *Towards a Right to Cultural identity?*, Antwerp/Oxford/New York, Intersentia/Hart, 2002; Jonathan Friedman, *Cultural Identity and Global Process*, London, Sage, 1994; Stuart Hall, Paul Du Gay (eds), *Questions of Cultural Identity*, London, Sage, 1996.

<sup>26</sup> See in particular the studies of the United Nations Special Rapporteur on Traditional Practices Affecting the Health of Women and Girls, Mrs. Halima E. Warzazi undertaken since 1989, *Study on Traditional Practices Affecting the Health of Women and Children*, UN Doc. E/CN.4/Sub.2/1991/6; Karen Engle, «Female Subjects of Public International Law: Human Rights and the Exotic Other Female», *New England Law Review*, vol. 26, 1991-1992, pp. 1509-1526.



has been challenged with the recognition of certain rights that may preserve and protect the cultural identity and the survival of certain groups.

The concept of cultural identity<sup>27</sup> is an area of anthropological and political studies which has been the object of debate also in the context of cultural rights. The traditional, narrow definition of cultural rights has focused on two possible definitions. One is related to the rights concerning the authorship and ownership of cultural products.<sup>28</sup> Partly, this human right is protected by copyrights laws.<sup>29</sup> It comprises the right to have recognised the ownership of cultural artefacts, and intellectual activities including literature, paintings, music, and scientific research. Attached to those types of right is the recognition of economic and moral rights that may derive from the creation of cultural products, as part of human rights.

A second definition of cultural rights includes rights that represent cultural wider features, linked to social and anthropological elements. These rights are based on Article 27 of the International Covenant on Civil and Political Rights,<sup>30</sup> which states that:

«In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language».

<sup>27</sup> See Donders, *supra* note 25; Donnelly, *Universal Human Rights*, *supra* note 2, pp. 214-215 and 220-221; Javier de Lucas, *Globalización e identidades. Claves políticas y jurídicas*. Barcelona, Icaria, 2003.

<sup>28</sup> CESCR, General Comment No. 17, *The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, UN Doc. E/C.12/GC/17, 12 January 2006.

<sup>29</sup> See, for instance, international instruments which include: the *Paris Convention for the Protection of Industrial Property*, as last revised in 1967; the *Berne Convention for the Protection of Literary and Artistic Works*, as last revised in 1979; the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (Rome Convention, 26 October 1961); the *WIPO Copyright Treaty*, Geneva, 20 December 1996; the *WIPO Performances and Phonograms Treaty*, Geneva 20 December 1996 (which, inter alia, provides international protection for performers of «expressions of folklore»), the *Convention on Biological Diversity*, Rio de Janeiro, 5 June 1992; the *Universal Copyright Convention*, Geneva, 6 September 1952, as last revised in 1971; and the *Agreement on Trade-related Aspects of Intellectual Property Rights* (TRIPS Agreement) of WTO, Marrakesh, Morocco, 15 April 1994.

<sup>30</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

The definition explicitly includes the right to use minority languages and the practice of religion. However, this may still be considered a quite narrow interpretation of culture. Actually, Article 27 refers, in general terms, to the right to enjoy the culture, without providing a definition of its content, and it refers not only to the individual dimension of the rights, but also to the possible enjoyment of those rights «in community with other members of their group». This opens the possibility of recognition of collective rights, which have also been quite problematic in the context of international human rights law, based on more individualistic and liberal theories, and due to the possible negative implications related to the enjoyment of individual rights in relation to groups' rights, including the concern of many States regarding the legal status of minorities, and other groups, within their national territory.

Difficulties and biases related to the recognition of cultural groups and collective rights can be therefore divided into two main issues. The first concerns the risk of cultural relativism, and the second relates to the possible threat based on claims of self-determination, leading to separation from the original State, of quite well defined and homogeneous groups in certain territorial areas of contemporary national States.<sup>31</sup>

Cultural relativism has emerged as a possible threat to the notion of universal rights,<sup>32</sup> because it stands at the core of contemporary human rights definition and protection. It is considered that if fundamental rights are universal and applicable everywhere to every human being, cultural diversity might undermine such postulate. If different groups may claim different rights, based on ethnic, religious and more general cultural specificities, it is assumed that the principle of non-discrimination and equality may face certain limitations or restrictions that are not easily acceptable either in theory or in practice.

The presence of strong cultural characteristics of certain groups, in particular minorities and indigenous peoples, has led most States to reject the idea of their full legal recognition under both national and international law. Some States have conceded some limited rights, such as the use of local or

<sup>31</sup> Karen Knop, *Diversity and Self-Determination in International Law*, Cambridge, Cambridge University Press, 2002; S. James Anaya, «The Capacity of International Law to Advance Ethnic or Nationality Rights Claims», *Human Rights Quarterly*, vol. 13, no. 3, 1991, pp. 403-411.

<sup>32</sup> Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law', *Buffalo Human Rights Law Review*, vol. 5, 1999, pp. 211-221.

autochthonous languages, or religious practices. Forms of local government, as a possible way to protect cultural traditions in the community, are more difficult to accept even in the limited forms of autonomous government of local minority groups. It is clear, in this last case, the possible link between cultural rights and civil and political rights.

This article shall look at the definition of the expression «taking part in cultural life» on the basis of the UN Committee on Economic, Social and Cultural Rights' General Comment No. 21. Examples shall be provided by looking at international norms related to cultural rights. This should allow a better understanding of the content of cultural rights by the main UN body dealing with the interpretation and application of cultural rights, which are recognised in Article 15 of the ICESCR.

### 3. NORMATIVE ELEMENTS

The General Comment No. 21 addresses in particular those provisions of the ICESCR which refer to the participation in cultural life, foreseen in Article 15(1)(a), and those provisions that are also included in paragraphs 2, 3 and 4 of the same article. A separate General Comment on the protection of moral and material interests resulting from any scientific, literary or artistic production, based on Article 15(1)(c) was adopted in 2005,<sup>33</sup> therefore these aspects of cultural rights shall not be discussed in the present article. The normative content of the right to take part in cultural life is defined in Section II of the General Comment No. 21, which addresses a series of interesting aspects which need clarification at international level and that can provide guidelines for States in this complex area of human rights.

The CESCR considers that the «right to take part in cultural life» can be characterised as a freedom, which implies both abstentions and positive actions by each State Party to the ICESCR.<sup>34</sup> The CESCR affirms that this freedom can be expressed both as an individual and a collective right. It makes reference to the definition already provided in its General Comment No. 17, where the term «everyone» may refer to «a person (a) as an individual, (b) in

<sup>33</sup> CESCR, General Comment No. 17 (2005).

<sup>34</sup> CESCR, General Comment No. 21, para. 6.

association with others, or (c) within a community or group».<sup>35</sup> In this last context, the CESCR makes specific reference to the rights of indigenous peoples ‘who have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms’ recognised at international level, as expressed also in the 2007 *Universal Declaration on the Rights of Indigenous Peoples*.<sup>36</sup>

The concept of «cultural life» depends on the definition of «culture». The CESCR recognises that there are many existing definitions of this term and new definitions may also appear in the future, particularly in relation to the research in anthropological studies.<sup>37</sup> However, it observes that a general feature is «the multifaceted content implicit in the concept of culture».<sup>38</sup> The CESCR adopts a broad concept of culture which includes «all manifestations of human existence» and is conceived as a «living process, historical, dynamic and evolving».<sup>39</sup> This particularly wide definition derives from anthropological and sociological studies on culture, and it has been included also in other international documents, in particular in several UNESCO declarations and conventions which address cultural rights.<sup>40</sup>

These definitions of culture are based on the idea that culture is a «creation and product of society» that shapes and identifies communities, defines groups and individuals which necessarily interact, «while preserving their specificities and purposes».<sup>41</sup> The CESCR suggests that in implementing Article 15(1)(a) States «should go beyond the material aspects of culture and adopt policies, programmes and proactive measures that also promote effective access by all to intangible cultural goods».<sup>42</sup>

<sup>35</sup> CESCR, General Comment No. 21, para. 9.

<sup>36</sup> See *supra* note 6.

<sup>37</sup> Ann-Belinda Preis, ‘Human Rights as Cultural Practice: An Anthropological Critique’, *Human Rights Quarterly*, vol. 18, 1996, pp. 286-315.

<sup>38</sup> CESCR, General Comment No. 21, para. 10.

<sup>39</sup> CESCR, General Comment No. 21, para. 11.

<sup>40</sup> See in particular the following UNESCO documents: *Universal Declaration on Cultural Diversity*, 2 November 2001, available at: <http://www.unhcr.org/refworld/docid/435cbcd64.html> [accessed 22 November 2010]; *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, Paris, 20 October 2005; *Convention for the Safeguarding of the Intangible Cultural Heritage*, Paris, 17 October 2003; *Recommendation on the Safeguarding of Traditional Culture and Folklore*, 15 November 1989; *Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It*, 26 November 1976.

<sup>41</sup> CESCR, General Comment No. 21, para. 12.

<sup>42</sup> CESCR, General Comment No. 21, para. 69.

The concept of culture defined in such broad terms includes, «inter alia, language, oral and written literature, music and songs, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions».<sup>43</sup> This evolution is based mainly on anthropological studies and international documents adopted by UNESCO which refer to cultural diversity as «an ethical imperative, inseparable from respect for human dignity».<sup>44</sup>

The two expressions «right to participate» and «to take part» in cultural life are considered to have the same meaning and therefore can be used interchangeably also in other international documents. What is relevant is the possible meaning of the expression for the purpose of defining the rights that are provided to individuals and groups. The CESCR points out three possible meanings, which include: (a) participation in, (b) access to, and (c) contribution to cultural life.

Participation is often linked to individuals' choice and to the concept of identity. The choice refers to the option(s) that individuals may freely exercise when they choose certain cultural expressions and practices. These expressions are usually very much linked to the identity of individuals and groups, because the individual who chooses a specific practice or culture may identify himself or herself with a particular community. In that way individual choices shape the identity of the individual and of the group at the same time. These forms of cultural participation include for instance the use of certain languages and religious affiliation or practices. Participation includes also the right to seek and develop cultural knowledge and expressions, which in part are also recognised as forms of contribution to cultural life of a specific community. For instance, regarding indigenous communities and peoples these expressions may include names, stories, chants, riddles, histories and songs in oral narratives, woodwork, metalwork, painting, jewellery, weaving, needlework, shell work, rugs, costumes and textiles, music, dances, theatre, literature, ceremonies, and ritual performances.<sup>45</sup>

<sup>43</sup> CESCR, General Comment No. 21, para. 13.

<sup>44</sup> UNESCO, Universal Declaration on Cultural Diversity, *supra* note 40, Art. 4.

<sup>45</sup> See, for instance, Panama, *Law No. 20 of 26 June 2000 on the Special Intellectual Property Regime with Respect to the Collective Rights of Indigenous Peoples to the Protection and Defense of their Cultural Identity and Traditional Knowledge*; *Executive Decree No. 12 of March 20, 2001 establishing regulations under Law*

Access to culture relates to the right of everyone «to know and understand his or her own culture and that of others through education and information». This right is also associated to the right to receive «quality education and training with due regard for cultural identity».<sup>46</sup> In this context, the CESCR does not clarify the meaning of cultural identity, which would have been a welcome contribution to the recent debate on this complex issue.<sup>47</sup> The CESCR has made reference to it in the previous section of the General Comment, but the idea of cultural identity is a very complex sociological and anthropological issue, with relevant implications for the protection of human rights. As it is demonstrated in several cases and analysis of the possible differences between cultural traditions, the concept of cultural identity needs further clarification in defining with the possible limits of cultural practices in relation to the protection of human rights. In part this issue is discussed in General Comment No. 21 in a later sub-section.

The right to access includes the possible use of different forms of expression, communication and dissemination, but also the right to «follow a way associated with the use of cultural goods and resources such as land, water, biodiversity, language or specific institutions».<sup>48</sup> This right of access can be exercised by individuals alone, in association with others, or by communities.<sup>49</sup>

Finally, the participation is also expressed through the different forms of contribution to cultural life. This means the «right to be involved in creating the spiritual, material, intellectual and emotional expressions of the community» where individuals live.<sup>50</sup> These expressions can also be manifested in a collective form when certain cultural practices are part of the identity of a group, such as the use of a specific language or religious practices. The free contribution to these practices clearly implies the free exercise of individual rights, in particular the enjoyment of cultural rights.<sup>51</sup>

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No. 20 of June 26, 2000 about a Special Regime of Collective Rights of Intellectual Property of Indigenous People for Protection of their Cultural Identity and their Traditional Knowledge; Secretariat of the Pacific Community, *Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model Law 2002*, Noumea, New Caledonia, 2006.

<sup>46</sup> CESCR, General Comment No. 21, para. 15(b).

<sup>47</sup> See Donders, *supra* note 25.

<sup>48</sup> CESCR, General Comment No. 21, para. 15(b).

<sup>49</sup> CESCR, General Comment No. 21, para. 15(b).

<sup>50</sup> CESCR, General Comment No. 21, para. 15(c).

<sup>51</sup> See UNESCO, *Universal Declaration on Cultural Diversity*, *supra* note 40, Art. 5; see also, *Fribourg Declaration on Cultural Rights*, 2007, <http://www1.umn.edu/humanrts/instree/Fribourg%20>

### 3.1. *Elements of the Right to Take Part in Cultural Life*

Some other elements are considered particularly relevant for the enjoyment and realisation of the right to take part in cultural life on the basis of equality and non-discrimination. These elements include availability, accessibility, acceptability, adaptability and appropriateness,<sup>52</sup> which shall be exemplified below.

Availability refers to the «presence of cultural goods and services» such as libraries, museums, theatres, cinemas, sport stadiums, spaces for cultural interaction, such as parks, squares and avenues; natural spaces like sea, lakes, rivers, mountains forest and natural reserves, including the flora and fauna which give nations their character and biodiversity. These last conditions are clearly influenced by the parallel ongoing debate on the rights of indigenous peoples, and their different forms of cultural expressions which are strictly related to the territory and lands of their ancestral usage. The same availability is referred to intangible cultural goods, which include the use of languages, customs, traditions, beliefs, knowledge and history, and values which are essential elements of the definition and maintenance of groups' identity and cultural diversity of individuals and communities. The CESCR also refers to the importance and «special value» of the interaction that arises when different groups, minorities and communities can freely share the same territory. However, this idealistic vision does not seem to be reflected in many geographical and political contexts, where different communities with different traditions seem to face significant problems in establishing and maintaining peaceful relations and forms of viable cross-cultural coexistence.

Accessibility is defined as the «effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination».<sup>53</sup> The

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[Declaration.pdf](#) [accessed 25 August 2011], Art. 7; see, Patrice Meyer-Bisch (ed.), *Les droits culturels. Projet de déclaration*, Paris, Unesco/Éditions universitaires, 1998; Patrice Meyer-Bisch et Mylène Bidault, *Déclarer les droits culturels. Commentaire de la Déclaration de Fribourg*, Zürich/Bruxelles, Schulthess/Bruylant, 2010.

<sup>52</sup> The same criteria were also defined in the CESCR, General Comment No. 13 on the Right to Education, see UN Doc. E/C.12/1999/10 (1999). See also the preliminary report the UN Commission on Human Rights of the Special Rapporteur on the right to education, UN Doc. E/CN.4/1999/49 (13 January 1999), para. 50.

<sup>53</sup> See CESCR General Comment No. 20, 2009.

CESCR points out the relevance of this requisite in particular for older persons, persons with disabilities, and for those living in poverty. The requisite of accessibility includes the right «to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination». For instance this has been included in access to mass media by indigenous populations that have had limited access to the national and local forms of communication in national broadcasting networks.

The CESCR defined in more details the aforementioned elements in its General Comment No. 13 which, in relation to the right to education, identified three overlapping dimensions: non-discrimination, physical accessibility and economic accessibility. In this specific context, probably due to the wider definition of cultural life, the CESCR has not provided a detailed definition of the elements which constitute the requisite of accessibility. However, it is reasonable to understand that the requirements defined in one General Comment can be used to illustrate and clarify the content and terms of another General Comment, in particular when adopted by the same Committee.

Acceptability refers to the requirement that laws, policies, strategies, programmes and measures which are adopted by the State party to the ICESCR should be formulated and implemented in a way that is acceptable to individuals and communities involved. This is an essential element also of contemporary governance at local level, which implies the participation and consultation of communities and individuals that may, in this case, «ensure that the measures to protect cultural diversity are acceptable to them».<sup>54</sup>

Adaptability has a very strict relationship with the previous requirement, as its definition mentions «the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party...which must be respectful of the cultural diversity of individuals and communities». It is clear that the respect of the individual and collective culture needs a sort of consultation or previous approval of the communities and individuals that are affected by State's actions.

Appropriateness is the fourth and final requisite, which takes into consideration the differences and specificities of diverse cultures. In this specific context, the CESCR refers to the realisation of specific human rights «in a

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<sup>54</sup> CESCR, General Comment No. 21, para. 16(c).



way that is pertinent and suitable to a given cultural modality or context».<sup>55</sup> This means that when implementing specific human rights, States parties should take into consideration the cultural specificities of individuals and communities, which include minorities and indigenous peoples.<sup>56</sup> To clarify this concept, the CESCR refers to its established jurisprudence which has made reference to the notions of «cultural appropriateness», and of «cultural acceptability or adequacy» which were mentioned in previous General Comments, in particular those dealing with the right to food, health, water, housing and education. In the implementation of these rights, the CESCR has pointed out the importance of keeping into due consideration cultural values, which are attached, for instance, to food, to the use of water, to the way how housing is designed and constructed, and to the forms how health and education services are provided.

### 3.2. *Possible Limitations to the Right*

As already mentioned before, the issue of cultural traditions and practices is becoming particularly complex when they collide with other fundamental rights. The CESCR has pointed out that States Parties should implement their obligations under Article 15(1)(a) in conjunction with their other international obligations arising from human rights instruments under international law. The Committee also remembers that «regardless of their political, economic or cultural systems», States have also legal obligations to promote and protect all human rights and fundamental freedoms, as established by the Vienna Declaration and Programme of Action.<sup>57</sup> The general rule identified by the Committee is therefore that «no one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope».<sup>58</sup>

Limitations in the exercise of certain cultural practices are therefore considered possible in certain circumstances, when they represent a form of viola-

<sup>55</sup> CESCR, General Comment No. 21, para. 16(e).

<sup>56</sup> See *Fribourg Declaration on Cultural Rights*, *supra* note 51, Art. 1(e).

<sup>57</sup> UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, UN Doc. A/CONF.157/23, para. 5.

<sup>58</sup> CESCR, General Comment No. 21, para. 18; Universal Declaration on Cultural Diversity, Art. 4.

tion or limitation of other human rights. The Committee considers that such limitations, as any limitation concerning fundamental rights, «must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant».<sup>59</sup>

Another characteristic of the limitation must be its proportionality, in the sense that «the least restrictive measures must be taken when several types of limitations may be imposed».<sup>60</sup> The Committee also remembers that these types of limitations have to take into consideration existing international human rights standards that are «intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and freedom of association».<sup>61</sup> It is in fact clear that cultural expressions and traditions may very often relate to those fundamental rights, for instance in the forms of manifestation of certain beliefs, or the practices of certain groups related to collective manifestations, and therefore, the limitations should take into consideration the risk of infringement of those other fundamental rights, and not only the cultural expression that they may represent or protect.

A final statement by the Committee, that reinforces the possibility of imposing certain limitation of cultural expressions and traditions, is that Article 15(1)(a) «may not be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized in the Covenant or at their limitation to a greater extent than is provided for therein».<sup>62</sup> This very general rule is based on Article 5 of the ICESCR. It is a clause used in several other international human rights instruments, and derives from Article 30 of the *Universal Declaration of Human Rights*. The purpose is that human rights claims cannot be used to destroy or infringe other human rights. There must be a balance when certain rights are not absolute rights. This is a quite well known practice in national and international case law, that when two or more rights come to a clash, judges must offer a fair balance between the different colliding interests and rights. Therefore, limitations of cultural

<sup>59</sup> CESCR, General Comment No. 21, para. 19.

<sup>60</sup> *Ibidem*.

<sup>61</sup> *Ibidem*.

<sup>62</sup> *Ibid.*, para. 20.

elements and practices are not against human rights law, but should be guaranteed within that framework.

### 3.3. *Non-discrimination and Equal Treatment*

The General Comment also provides a section on certain issues that need a particular attention in relation to the general principle of non-discrimination and equal treatment. It reminds the existence of the general provision contained in Articles 2(2) and 3 of the ICESCR which prohibits any form of discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. These issues were clarified in the General Comment No. 20 of 2009 adopted by the same Committee, and to which it is appropriate to refer for further clarification.

With regard to the participation in cultural life, the Committee clarifies that the application of the principle of non-discrimination means that «no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or group, or to practise or not to practise a particular cultural activity. Likewise, no one shall be excluded from access to cultural practices, goods and services».<sup>63</sup> The Committee has pointed out for instance the discrimination which indigenous people suffer «with regard to access to, *inter alia*, landownership, work, education, health services and adequate nutrition and housing».<sup>64</sup>

To implement this set of obligations, States have to adopt different measures. The Committee is concerned about the limited economic resources that States may use to deal with this type of obligations. The Committee has already analysed the type of obligations that States should take to implement the Covenant, and in particular the concept of «maximum of available resources» that States should use to promote and protect the rights contained in the Covenant.<sup>65</sup> However, the Committee has several times stressed in other

<sup>63</sup> *Ibid.*, para. 22.

<sup>64</sup> CESCR, *Guatemala: Concluding Observations*, UN Doc. E/2004/22 (2003) 59 at para. 403; *Ecuador: Concluding Observations*, UN Doc. E/2005/22 (2004) 39 at para. 277;

<sup>65</sup> CESCR, General Comment No. 3 (1990); see also CESCR, *An Evaluation of the Obligation to Take Steps to the «Maximum of Available Resources» Under an Optional Protocol to the Covenant*, doc.E/C.12/2007/1 (10 May 2007).

documents the fact that there are various options that States can adopt and which do not necessarily imply major economic costs, such as legislative reforms, publicity and information campaigns. In addition to legislation, the Committee understands the term «appropriate means» to include the provision of judicial or other remedies, where appropriate, as well as «administrative, financial, educational and social measures».<sup>66</sup>

The first step to be taken in the promotion of cultural rights is considered the actual recognition of the existence of «diverse cultural identities of individuals and communities» within the territory of the State. In many cases, the fact of non-recognition of various cultural traditions and groups has been used by States to either ignore or persecute those individuals and groups that did not recognise themselves in the general or «official» cultural set of traditions of the State where they lived. This has been the case for many types of minorities, including linguistic, religious and ethnic groups, and in the case of many States the non consideration of other forms of social and cultural organisations that represent forms of diversity within the more homogeneous structures of modern States. It has to be considered that several non-democratic States also ignore the existence of certain minorities for political reasons and that the amount of discriminatory practices against minority groups is still widespread.

The Committee also remembers that States may adopt temporary special measures, which are also defined sometimes as «positive discrimination», with the sole purpose of achieving *de facto* equality. These measures have been also the object of a particular analysis of the Committee in the context of non-discrimination. These measures are not considered to be discriminatory, as far as they are designed to protect certain disadvantaged groups. Actually, they address historical, social and economic inequalities, and they should be discontinued when the purpose has been achieved.

### 3.4. *Persons and Groups Requiring Special Protection*

The Committee looks at some groups and persons that may deserve specific measures and protection in ensuring their right to participation in cultural life. The main attention is focused on women, on the basis of the equal rights

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<sup>66</sup> CESCR, General Comment No. 3, para. 7; General Comment No. 9, paras. 3-5, 7.

of men and women to the enjoyment of economic, social and cultural rights, as defined in Article 3 of the Covenant read in conjunction with Article 15(1) (a). This consideration must be linked to the principle of non-discrimination, already discussed above, and it is considered to be a mandatory and immediate obligation for States Parties, as acknowledged in General Comment No. 16.<sup>67</sup> In this particular field, States must remove all «institutional and legal obstacles as well as those based on negative practices, including those attributed to customs and traditions, that prevent women from participating fully in cultural life, science education and scientific research».<sup>68</sup>

Children are considered a particularly relevant sector of the population because of their «fundamental role as the bearers and transmitters of cultural values from generation to generation».<sup>69</sup> The Committee focuses on the specific aspects of the right to education in relation to cultural rights, taking into particular consideration the aims of education as expressed also at international level. Education should therefore aim at personal and intellectual development including the «transmission and enrichment of common cultural and moral values». The content of education should include human rights education, to enable children «to develop their personality and cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies».<sup>70</sup> These principles have been already affirmed by other human rights Committees in their consideration of States' reports.<sup>71</sup>

Among specific obligations of States parties, the Committee considers the need to develop educational programmes that «should respect the cultural specificities of national or ethnic, linguistic and religious minorities as well as indigenous peoples».<sup>72</sup> The programmes should provide information on the history, traditions, social, economic and cultural values of those groups, and should be included in school curricula for all, and not only for the children from those communities. In those specific cases, the Committee remembers

<sup>67</sup> CESCR, General Comment No. 16 (2005) para. 16

<sup>68</sup> CESCR, General Comment No. 21, para. 25

<sup>69</sup> *Ibid.*, para. 26.

<sup>70</sup> *Ibid.*, para. 26.

<sup>71</sup> See CRC, *Philippines: Concluding Observations*, UN Doc. CRC/C/150 (2005) 24 at paras. 123, 124, 136, 137, 171; *Ecuador: Concluding Observations*, UN Doc. CRC/C/150 (2005) 91 at para. 459

<sup>72</sup> CESCR, General Comment No. 21, para. 27.

that when communities have specific language traditions, States should ensure that educational programmes, taking into consideration the will of the communities, should be conducted in their own languages, also in consideration of international standards in the areas of minority, indigenous and child rights.<sup>73</sup>

The Committee considers also the role of older persons in society. Due to the demographic projections regarding the increase in the number of older people world-wide,<sup>74</sup> the Committee addresses the special needs of this part of the population. It stresses the importance of the promotion and protection of cultural rights of older persons due to the fact that they may strongly contribute with their creative, artistic and intellectual capacities to the transmission of information, knowledge, traditions and cultural values. In this context, the Committee refers mainly to existing international recommendations related to older people. In particular, it refers to the Vienna International Plan of Action on Aging which is the first international instrument on ageing that includes a series of guidelines and suggests various policies and programmes related to ageing.<sup>75</sup> Relevant recommendations suggest the development of programmes in which older people should act as teachers and transmitters of knowledge, culture and spiritual values and at the same time States and international organizations should support strategies to facilitate their access to cultural institutions such as museums, theatres, concert halls and cinemas.<sup>76</sup> The Committee also refers to the United Nations *Principles for Older Persons*,<sup>77</sup> in particular to principle 7 which recommends that older persons

<sup>73</sup> *Ibid.*, para. 27; UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 18 December 1992, A/RES/47/135, Arts. 2 and 4; *Declaration on the Rights of Indigenous Peoples*, *supra* note 6, Art. 14; ILO, *Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, Arts. 27 and 28.

<sup>74</sup> See United Nations, *Current Status of the Social Situation, Wellbeing, Participation in Development and Rights of Older Persons Worldwide*, Department of Economic and Social Affairs, Office of the High Commissioner for Human Rights, Draft August 2010, available at <http://www.un.org/ageing/whatsnew%20PDF/Ageing%20Comprehensive%20report%202010%202%20September.pdf>. [accessed on 30 August 2011].

<sup>75</sup> The *Vienna International Plan of Action on Aging* was endorsed by the United Nations General Assembly in 1982 with resolution 37/51 (3 December 1982), having been adopted the same year during the World Assembly on Ageing at Vienna, Austria, see UN General Assembly, A/RES/36/30 (13 November 1981). See also: United Nations, *Report of the World Assembly on Ageing, Vienna, 26 July-6 August 1982*, New York, 1982; United Nations, *Report of the Second World Assembly on Ageing, Madrid, 8-12 April 2002*, UN Doc. A/CONF.197/9, New York, 2002.

<sup>76</sup> See CESCR, General Comment No. 6 (1995), paras. 38 and 40.

<sup>77</sup> UN, General Assembly resolution 46/91 (16 December 1991).

should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.

Persons with disability also need particular attention due to specific limitations that endanger their access to cultural rights.<sup>78</sup> The Committee remembers the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*<sup>79</sup> that recommend States to ensure «that persons with disabilities have to opportunity to utilize their creative, artistic and intellectual potential» and that those persons have access to places related to the cultural performances and services.<sup>80</sup> The Committee explains that to facilitate the participation of persons with disabilities, States should facilitate their access to cultural material, television programmes, films, theatre and other cultural activities, in accessible forms. Other forms of ensuring the access include the facilitation of physical admission to places where cultural events or services are offered, such as theatres, museums, libraries, cinemas and tourist attractions. In this context, the Committee also refers to the «specific cultural and linguistic identity of persons with disabilities, including sign language and the culture of the deaf».<sup>81</sup>

Minorities, migrants and indigenous peoples are also addressed in three different subsections of the General Comment 21. In relation to the different identified groups, the Committee considers that Article 15(1)(a) should be applied to minorities. This means that States should «recognize, respect and protect minority cultures as an essential component of the identity of the States themselves».<sup>82</sup> This means that minorities should enjoy the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media and other manifestations of their cultural identity and as part of their membership of the minority. The Committee here also refers to the collective nature of minorities and to the recognition of their cultural identity and the right to participate in all areas of cultural life. It is suggested that minorities as collective entities and persons belonging to

<sup>78</sup> On the rights of disable people, see Francesco Seatzu, «La Convenzione delle Nazioni Unite sui diritti delle persone disabili: diritti garantiti, cooperazione, procedure di controllo», vol. 2, 2009, *Diritti umani e diritto internazionale*, pp. 259-280.

<sup>79</sup> UN, General Assembly, resolution 48/96, Annex (20 December 1993).

<sup>80</sup> *Ibid.*, Rule 10(2).

<sup>81</sup> CESCR, General Comment No. 21, para. 31.

<sup>82</sup> CESCR, General Comment No. 21, para. 32.

minorities should enjoy inclusion, participation and non-discrimination «with a view to preserving the distinctive character of minority cultures».<sup>83</sup> This implies also that States «should not prevent migrants from maintaining their cultural links with their countries of origin».<sup>84</sup>

Similar rights are also recognised for indigenous peoples, but with specific emphasis to the characteristics of these groups. In fact, the Committee stresses the «strongly communal» nature of the values and cultural life of indigenous peoples.<sup>85</sup> Taking into account also other existing international documents, explicit reference is made to the use of lands, territories and resources that have been traditionally owned, occupied, used or acquired by indigenous peoples, as part of the ancestral relationship with them, as part of their cultural identity.<sup>86</sup> The Committee remembers States Parties of the importance to «recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources», also in relation to other international treaties, such as the ILO Convention No. 160, as in the case of Sami land rights in Sweden.<sup>87</sup> In this context, the Committee recognises that indigenous peoples have the «right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions» which may include a variety of manifestations, such as «sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts».<sup>88</sup>

Finally, regarding persons living in poverty, the Committee reminds that poverty «seriously restricts the ability of a person or a group of persons» to exercise their rights related to participation in cultural life. In particular, this limitation «seriously affects their hopes for the future and their ability to en-

<sup>83</sup> *Ibid.*, para. 33.

<sup>84</sup> *Ibid.*, para. 34. See also *International Convention on the Protection of All Migrant Workers and Members of Their Families*, adopted by General Assembly resolution 45/158 (18 December 1990), Art. 31.

<sup>85</sup> CESCR, General Comment No. 21, para. 36. See also *Declaration on the Rights of Indigenous Peoples*, *supra* note 6, Art. 1; ILO Convention No. 169, *supra* note 73, Art. 1(2).

<sup>86</sup> CESCR, General Comment No. 21, para. 36. See also *Declaration on the Rights of Indigenous Peoples*, *supra* note 6, Arts. 20, 26(a) and 33; ILO Convention No. 169, *supra* note 73, Arts. 13-16.

<sup>87</sup> Sweden, ICESCR, UN Doc. E/2002/22 (2001) 106 at paras. 723, 724 and 735

<sup>88</sup> CESCR, General Comment No. 21, para. 37. See also ILO Convention No. 169, *supra* note 73, Arts. 5 and 31; UN *Declaration on the Rights of Indigenous Peoples*, *supra* note 6, Arts. 11-13.



joy effectively their own culture», and it leads to «a sense of powerlessness that is often a consequence of their situation»<sup>89</sup>. The Committee reminds that it is important that persons and groups of persons living in poverty are made aware of their human rights, to empower them to act and develop their social, economic and cultural conditions, as already recognised by other UN documents and bodies.<sup>90</sup> It is also affirmed that cultural empowerment is a tool «for reducing the disparities so that everyone can enjoy, on an equal footing, the values of their own culture within a democratic society».<sup>91</sup>

#### 4. STATES PARTIES' OBLIGATIONS AND IMPLEMENTATION

One of the main purposes of General Comments consists in the clarification of State Parties' obligations under the relevant treaty. This work provides clearer guidelines, examples and suggestions to States when they have to adopt legislative and other measures concerning the implementation of a specific treaty. General Comments are also used to guide the States Parties in the preparation of their Periodic Reports to relevant human right supervisory bodies. Therefore, some parts of General Comments provide quite specific information and suggestions, based also on the previous experience of each Committee and on other international human rights standards elaborated by other human rights treaty bodies and addressing specific rights analysed in each General Comment.

Part III of the General Comment No. 21 provides a quite detailed set of suggestions that clarify the nature and content of States Parties obligations, which include both general and specific legal obligations. Part V defines the possible forms of implementation at national level. Part IV addresses also possible forms of violation of the rights, and shall be discussed separately.

A general type of obligation is that States Parties must guarantee the application of Article 15(1)(a) «without discrimination, to recognize cultural practices and to refrain from interfering in their enjoyment and de-

<sup>89</sup> CESCR, General Comment No. 21, para. 38.

<sup>90</sup> See UN *Declaration on the Right to Development*, UN Doc. A/RES/41/128 (4 December 1986), Art. 2(1); UN Doc. E/C.12.2001/10, para. 5; UN Secretary General Report, *Legal Empowerment of the Poor and Eradication of Poverty*, UN Doc. A/64/133, 13 July 2009, para. 44.

<sup>91</sup> CESCR, General Comment No. 21, para. 69.

velopment».<sup>92</sup> In previous General Comments, the CESCR has considered the application of the principle of non-discrimination to specific ICESCR's rights relating to housing, food, education, health, water, authors' rights, work and social security.<sup>93</sup> It also devoted its General Comment No. 20 to the specific analysis of non-discrimination in economic, social and cultural rights.<sup>94</sup>

One of the main shortcomings of economic, social and cultural rights is the idea that they are the object of «progressive realisation», subject to available resources.<sup>95</sup> However, the Committee has always been quite clear that this cannot be used as an excuse by States to avoid actions in the realisation and promotion of economic, social and cultural rights. This is clarified by imposing on States Parties «the specific and continuing obligation to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life».<sup>96</sup> States are also limited in their choice of adopting «regressive measures» which are those measures taken deliberately by States to reduce or limit the scope or application of rights already reached in their national context. In those cases, the Committee considers that States have to prove that those specific measures were taken «after careful consideration of all alternatives and that the measure in question is justified, bearing in

<sup>92</sup> *Ibid.*, paras. 44 and 66.

<sup>93</sup> CESCR, General Comment No. 4 (1991): *The right to adequate housing*; General Comment No. 7 (1997): *The right to adequate housing: forced evictions* (Art. 11, para. 1); General Comment No. 12 (1999): *The right to adequate food*; General Comment No. 13 (1999): *The right to education* (Art. 13); General Comment No. 14 (2000): *The right to the highest attainable standard of health* (Art. 12); General Comment No. 15 (2002): *The right to water* (Arts. 11 and 12); General Comment No. 17 (2005): *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author* (Art. 15, para. 1 (c)); General Comment No. 18 (2005): *The right to work* (Art. 6); and General Comment No. 19 (2008): *The right to social security*.

<sup>94</sup> CESCR, General Comment No. 20 (2009).

<sup>95</sup> See Philip Alston and Gerard Quinn, «The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights», *Human Rights Quarterly*, vol. 9(2) 1987, pp. 156-229; Eitan Felner, «Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights», *Journal of Human Rights Practice*, vol. 1, Issue 3, pp. 402-435.

<sup>96</sup> CESCR, General Comment No. 21, para. 45. See also General Comments No. 3 (1990), para. 9; No. 13 (1999), para. 44; No. 14 (2000), para. 31; No. 17 (2005), para. 26; and No. 18 (2005), para. 20. See also *Limburg Principles on the Implementation of the International Covenant of Economic, Social and Cultural Rights*, *supra* note 2, para. 21.

mind the complete set of rights recognized in the Covenant»,<sup>97</sup> and the «full use of the maximum available resources».<sup>98</sup> The Committee also underlines the important «interrelationship» between the rights defined in Article 15 and the «adoption of steps necessary for the conservation, development and dissemination of science and culture, as well as steps to ensure respect for the freedom indispensable to scientific research and creative activity» in conformity with Article 15 paragraphs 2 and 3.<sup>99</sup>

The Committee also provides a list of so-called «minimum core obligations»,<sup>100</sup> which represent the «minimum essential levels» for the respect of the right.<sup>101</sup> Despite the fact that States have a wide margin of discretion regarding the forms of implementation of the right, for the Committee there is a minimum level of recognition and protection which is applicable with immediate effect,<sup>102</sup> therefore it is not subject to the «progressive realisation» that usually applied to economic, social and cultural rights.<sup>103</sup> According to the Committee the minimum provisions include the following measures:

- to take legislative and other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right to take part in cultural life;
- to respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice;
- to respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights, including the freedom of thought, belief, religion, opinion, expression, language, association and to choose and set up educational establishments;

<sup>97</sup> CESCR, General Comment No. 21, para. 46. See also General Comments No. 3 (1990), para. 9; No. 13 (1999), para. 45; No. 14 (2000), para. 32; No. 17 (2005), para 27; and No. 18 (2005), para. 21.

<sup>98</sup> CESCR, General Comment No. 21, para. 65. See also, Robert E. Robertson, «Measuring State Compliance with the Obligation to Devote the «Maximum Available Resources» to Realizing Economic, Social, and Cultural Rights», *Human Rights Quarterly*, vol. 16, no. 4, 1994, pp. 693-714.

<sup>99</sup> *Ibid.*, para. 47. See also CESCR, General Comments No. 13 (1999), paras. 46 and 47; No. 14 (2000), para. 33; No. 17 (2005), para. 28; and No. 18 (2005) para. 22.

<sup>100</sup> See Katharine Young, «The Minimum Core of Economic and Social Rights: A Concept in Search of Content», *Yale Journal of International Law*, vol. 33, no. 1, 2008, pp. 113-175.

<sup>101</sup> See also CESCR, General Comment No. 3 (1990).

<sup>102</sup> CESCR, General Comment No. 21, paras. 55, 66 and 67.

<sup>103</sup> See Mashood A. Baderin, Robert McCorquodale, *Economic, Social and Cultural Rights in Action*, Oxford, Oxford University Press, 2007; and bibliography cited *supra* note 95.

- to eliminate barriers or obstacles that inhibit or restrict a person's access to culture;
- to allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the definition of laws and policies that affect them, in particular with regard to cultural issues.

Among States' international obligations the General Comment includes several actions that States should take «individually and through international assistance and co-operation».<sup>104</sup> They are based on the obligations established under article 56 of the UN Charter and specific provisions of the ICESCR that make reference to international co-operation for the achievement of the rights included in the Covenant. These types of action include for instance international agreements,<sup>105</sup> forms of international co-operation, in accordance with Articles 55 and 56 of the UN Charter, and Articles 15 and 23 of the CDESCR.<sup>106</sup> These consideration also affect the role of international financial institutions, because development policies by States under the structural adjustment programmes «should not interfere with their core obligations» to guarantee the right under consideration.<sup>107</sup>

## 5. VIOLATIONS

Regarding possible forms of violations of the right under consideration, the Committee takes into consideration the specificities of cultural rights. In this sense, States Parties to the Covenant must show compliance with both general and specific obligations as discussed before. They also must show that they have taken «appropriate measures» that lead to the promotion and protection of cultural freedoms and the full realisation of the right to take part in cultural life, so that the right is enjoyed «equally and without discrimination».<sup>108</sup>

<sup>104</sup> See CDESCR, General Comment No. 3 (1990).

<sup>105</sup> See CDESCR, General Comment No. 18 (2005), para. 29.

<sup>106</sup> See CDESCR, General Comment No. 3 (1990), para. 14 and General Comment No. 18 (2005), para. 37.

<sup>107</sup> CDESCR, General Comment No. 21, para 59. See also General Comment No. 18 (2005), para. 30.

<sup>108</sup> CDESCR, General Comment No. 21, para. 60 and 67.

The assessment conducted by the Committee is based on several criteria, which are common to most rights included in the CDESCR. Actions by States should be «reasonable and proportionate with respect to the attainment of the relevant rights». They should comply with «human rights and democratic principles» but also take into account whether the measures, which have been adopted, are «subject to an adequate framework of monitoring and accountability».<sup>109</sup> It is also pointed out that the types of violations in this area may occur not only when States directly act in violation of the rights, but also when they «prevent access to cultural life, practices, goods and services by individuals or communities».<sup>110</sup>

The types of violation are also linked to the non-compliance by States by omission or failure to adopt the necessary measures to implement Article 15(1)(a). Omissions include the fact of non-enforcement of relevant laws or failure «to provide administrative, judicial or other appropriate remedies» through which individuals and groups might exercise the right to take part in cultural life.<sup>111</sup> Therefore, States should establish effective mechanisms and institutions that would be able to deal with violations of Article 15(1)(a) and «identify responsibilities, publicize the results and offer the necessary administrative, judicial or other remedies to compensate victims».<sup>112</sup>

Among the forms of implementation at national level States should also define appropriate indicators and benchmarks,<sup>113</sup> which, jointly with disaggregated statistics and appropriate time frames, would enable the effective monitoring process of implementation and progressive realisation of specific rights.<sup>114</sup>

Finally, it results particularly relevant, in the debate on cultural relativisms and multiculturalism, the fact that violations occur also when States fail to «combat practices harmful to the well-being of a person or group of per-

<sup>109</sup> *Ibid.*, para. 61.

<sup>110</sup> *Ibid.*, para. 62.

<sup>111</sup> *Ibid.*, para. 63.

<sup>112</sup> *Ibid.*, para. 70.

<sup>113</sup> See UN, *Report on Indicators for Promoting and Monitoring the Implementation of Human Rights*, UN Doc. HRI/MC/2008/3\* (6 June 2008). See also Gauthier de Beco, «Human Rights Indicators for Assessing State Compliance with International Human Rights», *Nordic Journal of International Law*, vol. 77, 2008, pp. 23-42; Maria Green, «What we talk about when we talk about indicators: current approaches to human rights measurement», *Human Rights Quarterly*, vol. 23, 2001, pp. 1062-1097.

<sup>114</sup> CDESCR, General Comment No. 21, para. 71.

sons», such as in the case of female genital mutilation, practices of witchcraft, which are «attributed to customs and traditions».<sup>115</sup>

## 6. CONCLUSIONS

The General Comment No. 21 represents a welcome contribution to the debate on the nature and content of cultural rights in a broad sense. From the examples provided in the General Comment No. 21, it is clear that the CESCR has adopted a wide concept of cultural rights, in conformity with previous General Comments and with the trends shown in other international documents adopted at international level. The General Comment provides also some definition of certain obligations of States in this area. However, the examples which are provided are still quite limited. There is a need to clarify that cultural diversity and promotion of identity rights, in particular collective forms, may conduct to policies of discrimination or even of exclusion that may negatively affect inclusive views of the society as required by human rights standards. The negative effects may also concern the same right to participation in cultural and political life.<sup>116</sup>

The reference to non-State actors mentioned at the end of the General Comment is far too limited. It would have been useful to have more elaborated analysis on this issue, which may be particularly relevant in the context of international responsibility of States and non-State actors in the promotion and violation of human rights. In particular with relation to groups and communities which may be recognised as non-State actors it would be relevant to understand the level of their accountability and responsibility for violations of fundamental rights.

There is also a need for more clarification regarding the definition of «traditional practices» which may be invoked as part of the cultural identity of peoples and groups. These are relevant issues today in many States. The presence of different cultural communities requires sometimes difficult adjustments that allow the respect and promotion of fundamental rights. In

<sup>115</sup> *Ibid.*, para. 64.

<sup>116</sup> See Sasja Tempelman, «Constructions of Cultural Identity: Multiculturalism and Exclusion», *Political Studies*, vol. 47, Issue 1, March 1999, pp. 17–31.

particular, it is important to clarify the extent of States' obligations under the international and national law, in relation to respect of specific cultural traditions. It may be difficult to provide a general rule on these issues, due to the variety of possible cases and situations. However, it might be relevant to have clearer guidelines that allow States to define national policies and legislation that are in conformity with international human rights standards. These rules would also be useful for judges when assessing the balance between different human rights obligations and forms of protection.

Therefore, there are complex legal relationships not yet fully addressed in the present General Comment, and whose clarification would have supplied better theoretical and practical arguments for the accommodation of cultural values within international human rights standards.

